107

2

No. 08-39

Supreme Court, U.S.
FILED
OCT 8 - 2008
OFFICE OF THE CLERK

In the Supreme Court of the United States

CHARLES T. HUTCHINS, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

WILLIAM BLUMENTHAL
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LAWRENCE DEMILLE-WAGMAN
Assistant General Counsel for Litigation
Federal Trade Commission
Washington, D.C. 20580

QUESTIONS PRESENTED

1. Whether petitioner is a "debt collector" subject to the provisions of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*

2. Whether a "consumer" as defined by the FDCPA includes a retail customer who incurs a debt by tendering a check written on an account containing insufficient funds.

3. Whether petitioner's debt-collection practices violated the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Bass v. *Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997) 5, 6, 14
Burk v. *Emmick*, 637 F.2d 1172 (8th Cir. 1980) 10
Coast Trading Co., In re, 744 F.2d 686 (9th Cir. 1984) .. 10
Dolan v. *USPS*, 546 U.S. 481 (2006) 11
Holmes v. *Telecredit Serv. Corp.*, 736 F. Supp. 1289 (D. Del. 1990) 10
Keele v. *Wexler*, 149 F.3d 589 (7th Cir. 1998) 14
Kimber v. *Federal Fin. Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987) 11, 12
Perry v. *Stewart Title Co.*, 756 F.2d 1197 (5th Cir. 1985) 12
Pollice v. *National Tax Funding, L.P.*, 225 F.3d 379 (3d Cir. 2000) 14, 15
Schlosser v. *Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003) 12
Surrick, In re, 338 F.3d 224 (3d Cir. 2003), cert. denied, 540 U.S. 1219 (2004) 15

Casess—Continued: Page

Trans World Accounts, Inc. v. *FTC*, 594 F.2d 212 (9th Cir. 1979) 8
United States v. *Gonzales*, 520 U.S. 1 (1997) 13
Wadlington v. *Credit Acceptance Corp.*, 76 F.3d 103 (6th Cir. 1996) 12
Wisniewski v. *United States*, 353 U.S. 901 (1957) 14
Zimmerman v. *HBO Affiliate Group*, 834 F.2d 1163 (3d Cir. 1987) 14, 15

Statutes:

Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.* 3
15 U.S.C. 1692a(3) 6, 13
15 U.S.C. 1692a(4) 7, 10
15 U.S.C. 1692a(5) 5, 13, 14
15 U.S.C. 1692a(6) 7, 9
15 U.S.C. 1692a(6)(A) 9
15 U.S.C. 1692a(6)(F)(iii) 7
15 U.S.C. 1692d 4
15 U.S.C. 1692e 4
15 U.S.C. 1692f 4
Federal Trade Commission Act, 15 U.S.C. 41 *et seq.* 3
15 U.S.C. 45 (§ 5) 4, 16
15 U.S.C. 45(a) (§ 5(a)) 4, 15, 16
15 U.S.C. 45(a)(1) (§ 5(a)(1)) 16
15 U.S.C. 45(n) (§ 5(n)) 9, 15, 16

Miscellaneous: Page

Blacks Law Dictionary (8th ed. 2004) 10
Fair Debt Collection Practices Act, S. Rep. No. 382, 95th Cong., 1st Sess. (1977) 12
U.C.C. § 2-703 official comment 3 (1978) 10

In the Supreme Court of the United States

No. 08-39

CHARLES T. HUTCHINS, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 502 F.3d 159. The opinion of the district court is not published in the *Federal Supplement* but is available at 2005 WL 1677480. The final order of the district court (Pet. App. 35-57) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2007. Petitions for rehearing were denied on February 6, 2008 (Pet. App. 59-60, 61-62). On April 24, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including July 5, 2008. The petition for a writ of certiorari was

filed on July 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Charles T. Hutchins (Hutchins) is or was general counsel of Check Investors, Inc., Check Enforcement, Inc., and Jaredco, Inc., entities that are or were engaged in the business of purchasing, and then trying to collect upon, large numbers of checks that had been written by retail customers on accounts containing insufficient funds (NSF checks). Barry Sussman is or was a corporate officer of those entities. Pet. App. 2-3 & nn.1-2.[1] We refer to Hutchins, Sussman, and their entities collectively as petitioners.

a. Petitioners purchased NSF checks from several check guaranty companies after the guaranty companies' attempts to collect on the checks had failed. Typically, the guaranty company had paid the full face value of the check to the merchant who had accepted the check as payment. In exchange, the merchant assigned its rights in the NSF check to the guaranty company. The guaranty company then would attempt to obtain payment on the NSF check from the bank on which the check was drawn or from the consumer who had tendered the check. If those collection efforts were unsuccessful, the guaranty company would hire one or more debt collection agencies to attempt to collect on the check on a contingency-fee basis. If those collection efforts also were unsuccessful, the guaranty company would sell the NSF check to petitioners for a small fraction of its face amount. Petitioners purchased over 2.2

---

[1] The entities and Sussman have filed a separate petition for a writ of certiorari arising from the same judgment that is at issue in this case. *Check Investors, Inc.* v. *FTC*, No. 08-37 (filed July 3, 2008).

million NSF checks with an estimated face value of $348 million. Pet. App. 3-4.

b. Petitioners routinely attempted to collect from the check writer a sum of money that was $125 or $130 more than the face value of the NSF check—in effect, charging a collection fee that exceeded the legal limit under the laws of most states. Petitioners' collection tactics also included aggressive dunning of consumers through letters and telephone calls demanding the full amount allegedly owed without disclosing the face amount of the check or the amount of the additional fee. Petitioners accused consumers of being criminals or "crooks" and falsely threatened consumers with arrest and criminal or civil prosecution if they failed to pay the amount owed. Petitioners also sent form collection letters indicating that Hutchins was considering legal action when, in fact, Hutchins had not investigated the status of the debts at issue. Petitioners employed other harassing collection techniques as well, such as the use of abusive language, contacting consumers' family members about the alleged debts, and "saturation phoning" whereby a consumer would be called repeatedly over a short period of time. Between January 1, 2000, and January 6, 2003, petitioners collected $10.2 million on NSF checks written by more than 42,000 consumers. Pet. App. 4-7.

2. The Federal Trade Commission (FTC) filed suit in the United States District Court for the District of New Jersey. The FTC's complaint alleged that the debt-collection practices employed by petitioners violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, and the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.* The FTC sought injunctive relief and monetary restitution for injured customers. Pet. App. 7-8.

a. The FDCPA applies to "debt collectors" and prohibits a variety of debt collection practices, including harassment or abuse of the consumer (such as the use of obscene language and repeated telephone calls), 15 U.S.C. 1692d; false or misleading representations (including false assertions concerning the character, amount, or legal status of a debt or the consequences of failing to pay a debt), 15 U.S.C. 1692e; and unfair practices (such as collecting fees in excess of those permitted by law), 15 U.S.C. 1692f. Section 5(a) of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a).

b. The parties filed cross-motions for summary judgment. Petitioners did not dispute that they had engaged in the collection practices alleged by the FTC. They asserted, *inter alia*, that the FDCPA did not apply to them because they were "creditors" collecting obligations owed to themselves rather than "debt collectors" collecting obligations owed to a third party. They also contended that the individuals who had written the NSF checks were criminals or tortfeasors and therefore were not "consumers" entitled to the protections of the FDCPA. Pet. App. 9.

c. The district court granted the FTC's motion for summary judgment and denied petitioners' cross-motion. 2005 WL 1677480, at *10. The court held that petitioners were "debt collectors" collecting "debts" as those terms are defined in the FDCPA. *Id.* at *6-*8. The court also held that the uncontested evidence demonstrated that petitioners had violated multiple provisions of the FDCPA and Section 5 of the FTC Act, 15 U.S.C. 45. *Id.* at *8-*10. The court permanently enjoined petitioners from engaging in debt-collection activities, violating the FDCPA, and making certain misrepresen-

tations. Pet. App. 41-44. The court also ordered petitioners to pay to the FTC, as restitution for consumer injury, the full amount they had collected through the use of unlawful practices, a sum that exceeded $10.2 million. *Id.* at 45-46; 2005 WL 1677480, at *10.

3. The court of appeals affirmed. Pet. App. 1-34. The court first held that the NSF checks that petitioners had purchased were "debts" under the FDCPA. *Id.* at 16-24. The court noted that the FDCPA defines "debt" broadly to mean "any obligation to pay arising out of a [consumer] transaction." *Id.* at 18 (quoting *Bass* v. *Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1325 (7th Cir. 1997)).[2] Agreeing with the four other courts of appeals that had addressed the issue, the court concluded that a NSF check "evidences the drawer's obligation to pay for the purchases made with the check" and thus is a "debt" under the FDCPA. *Id.* at 18-19 (emphasis omitted) (quoting *Bass*, 111 F.3d at 1325).

The court of appeals also rejected petitioners' argument that NSF checks are not "debts" because they arise out of criminal or tortious conduct, rather than out of a consumer transaction. Pet. App. 19-24. The court noted that under the common law of fraud and under most criminal statutes, a NSF check cannot be the basis for tort or criminal liability unless the drawer "either knew or intended that the check be dishonored *at the time the check was drawn.*" *Id.* at 20 (quoting *Bass*, 111 F.3d at 1329). Because a bank can refuse payment on a

---

[2] The full definition of "debt" for purposes of the FDCPA is "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. 1692a(5).

check for many reasons, and because the drawer of a dishonored check may not have a criminal or fraudulent intent at the time the check was drawn, the court rejected the "argument that all dishonored checks are fraudulent and thus not covered by the [FDCPA]." *Id.* at 20-21 (brackets in original) (quoting *Bass*, 111 F.3d at 1329). The court also concluded that the "explicit and unambiguous text of the FDCPA" demonstrated that it contains no "fraud exception," a conclusion reinforced by the legislative history. *Id.* at 21-24. The court noted that "[n]o section of the [FDCPA] requires an inquiry into [the] worthiness of the debtor, or purports to protect only 'deserving' debtors," and that the "singular focus [of the FDCPA] is on curbing abusive and deceptive collection practices, not abusive and deceptive consumer payment practices." *Id.* at 22 (quoting *Bass*, 111 F.3d at 1330).

The court of appeals also rejected petitioners' claim that the payors of NSF checks are not "consumers" entitled to the protections of the FDCPA. Pet. App. 24-25. The court noted that the FDCPA defines "consumer" as "*any* natural person obligated or allegedly obligated to pay *any* debt." *Id.* at 25 (emphasis in original) (quoting 15 U.S.C. 1692a(3)). Having already determined that NSF checks were "debts" under the FDCPA, the court concluded that the "all inclusive" statutory definition "unambiguously" encompassed the payors of NSF checks. *Ibid.*

The court of appeals further held that petitioners are "debt collectors" rather than "creditors" under the FDCPA. Pet. App. 26-33. The court recited the applicable statutory definition of the term "creditor":

> [A]ny person who offers or extends credit creating a debt or *to whom a debt is owed*, but such term does

> not include any person to the extent [that] he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

Id. at 28 (emphasis in original) (quoting 15 U.S.C. 1692a(4)). The court rejected petitioners' argument that because they had *purchased* the NSF checks from the guaranty companies, they were creditors "to whom a debt [was] owed" and not debt collectors collecting debts owed to another. *Ibid.* The court observed that petitioners' interpretation of the statute "would elevate form over substance and weave a technical loophole into the fabric of the FDCPA big enough to devour all of the protections Congress intended in enacting that legislation." *Ibid.*

The court of appeals also noted that the FDCPA's definition of the term "debt collector" excludes persons collecting debt due to another to the extent that such activity "concern[ed] a debt which was not in default at the time it was obtained by such person." Pet. App. 29-30 (quoting 15 U.S.C. 1692a(6)(F)(iii)).[3] The court concluded that, through the definition of "debt collector," "Congress ha[d] unambiguously directed [the court's]

---

[3] The FDCPA defines the term "debt collector" to mean "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). The statutory definition contains several exclusions. The exclusion identified by the court of appeals applies to "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity * * * concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. 1692a(6)(F)(iii).

focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA." *Id.* at 30. The court also relied on legislative history confirming that Congress's focus in the FDCPA was on "third-party collectors of past due debts" who, unlike creditors, would not be constrained in their collection tactics by the desire to maintain good will with the consumer. *Id.* at 30-31. Applying those principles to the facts of this case, the court held that petitioners were "debt collectors" subject to the FDCPA because they "acquired the defaulted checks only for collection purposes." *Id.* at 31. The court also observed that petitioners' "course of conduct exemplifies why Congress enacted the FDCPA and the wisdom of doing so." *Id.* at 33.

The court of appeals held that petitioners' conduct was prohibited by the FTC Act as well. Pet. App. 33-34. The court explained that the FTC Act prohibits deceptive acts or practices employed in the collection of debts, *id.* at 33 (citing *Trans World Accounts, Inc.* v. *FTC*, 594 F.2d 212, 214 (9th Cir. 1979)), and that the payors of the NSF checks were therefore "consumer[s]" within the meaning of the FTC Act. *Ibid.* The court further concluded that the debt collection techniques utilized by petitioners constituted a "deceptive business practice" within the meaning of the FTC Act. *Id.* at 34.

ARGUMENT

Hutchins contends that the court of appeals erred by finding that petitioners are "debt collectors" subject to the FDCPA (Pet. 4-10) and that the payors of the NSF checks are "consumers" protected by the FDCPA (Pet. 10-16). Hutchins further contends (Pet. 16-19) that the payors of NSF checks are not "consumers" for purposes

of the FTC Act and that 15 U.S.C. 45(n) therefore was not satisfied. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Hutchins contends (Pet. 4-10) that petitioners are not "debt collectors" subject to the restrictions of the FDCPA. The court of appeals correctly rejected that contention, and its interpretation of the relevant statutory provisions is consistent with the decisions of other courts of appeals as well as with the statute's text and legislative history.

The FDCPA provides alternative definitions of the term "debt collector," one of which is "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts[.]" 15 U.S.C. 1692a(6); see note 3, *supra*. Petitioners did not dispute in the lower courts that they used instrumentalities of interstate commerce in their business (*e.g.*, the mail and telephones), nor did they dispute that the "principal purpose" of their business was to collect the amounts due on NSF checks, which are debts. Gov't C.A. Br. 23; see *infra* p. 13. Petitioners therefore fell squarely within the statutory definition of "debt collector."

Hutchins responds (Pet. 4-10) that petitioners qualify for the "creditor" exception to the definition of "debt collector." See 15 U.S.C. 1692a(6)(A) (excluding from term "debt collector" any officer or employee of a "creditor" while collecting debts for the creditor in the name of the creditor). The FDCPA defines the term "creditor" to include "any person * * * to whom a debt is owed," but *excludes* from that category any person who "receives an assignment or transfer of a debt in default

solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. 1692a(4); see pp. 6-7, *supra*. Hutchins concedes (Pet. 6) that petitioners "did receive an assignment or transfer of a debt." Hutchins contends that petitioners are "creditors" nonetheless because the FTC failed to demonstrate that the NSF checks were "in default" at the time of the assignment or transfer (Pet. 6-7) and because petitioners' "purpose" was to collect the debts *for themselves* and not "for another" (Pet. 7-10). The court of appeals correctly rejected those arguments.

a. A "default" is "the omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due." Pet. App. 26 n.12 (quoting *Blacks Law Dictionary* 449 (8th ed. 2004)). Petitioners purchased NSF checks only after they had been dishonored and after a check guaranty company had made unsuccessful efforts, both on its own and through a debt collection agency, to collect payment on the checks. *Id.* at 3-4. The court correctly found that the NSF checks therefore were "in default" at the time petitioners obtained them. See *Holmes* v. *Telecredit Serv. Corp.*, 736 F. Supp. 1289, 1293 (D. Del. 1990); see also *In re Coast Trading Co.*, 744 F.2d 686, 691 (9th Cir. 1984) (equating the dishonor of a check with a default in an obligation to pay); *Burk* v. *Emmick*, 637 F.2d 1172, 1176 (8th Cir. 1980) (same, citing U.C.C. § 2-703 official comment 3, at 179 (1978)). Hutchins identifies no conflict between the court's decision and a decision of this Court or of another court of appeals.

b. The "assignment" exception to the FDCPA's definition of creditor is unclear, because an "assignment" of a debt generally will result in a transfer of all rights in the debt, meaning that "any collection of [the]

debt by the assignee would generally be for itself." *Kimber* v. *Federal Fin. Corp.*, 668 F. Supp. 1480, 1485 (M.D. Ala. 1987). The "assignment" exception nonetheless "refers to the assignee's collection as being for another." *Ibid.* Ambiguity also arises from the clause that precedes the "assignment" exception, which defines "creditor" to include only "those who originate a debt or to whom a debt is owed," *i.e.*, persons who collect debts *for themselves*. Interpreting the "assignment" exception to cover only those who collect debts *for another* would "render the exception superfluous and meaningless" because "those who collect debts for others are not in the original definitional universe, and there is therefore no need to exclude them." *Ibid.*

To resolve the ambiguities presented by the "for another" phrase in the "assignment" exception, the court of appeals correctly considered the broader statutory context and the legislative history of the FDCPA . See, *e.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006) (interpretation of a word or phrase in a statute "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis"). The court recognized that petitioners' interpretation of the phrase "for another" would "weave a technical loophole into the fabric of the FDCPA big enough to devour all of the protections Congress intended in enacting that legislation." Pet. App. 28.

First, petitioners' interpretation would create conflicts with other provisions of the statutory scheme that address third parties who collect debts that originally were due to another—such as the definition of "debt collector"—in which Congress "unambiguously directed [courts to] focus [on] the time the debt was acquired

[*i.e.*, whether the debt was already in default at the time of the acquisition] in determining whether one is acting as a creditor or debt collector under the FDCPA," Pet. App. 30. Second, petitioners' interpretation would frustrate Congress's intent to include within the category of "debt collectors" third persons who regularly collect debts, on the theory that those independent debt collectors likely will have "no future contact with the consumer" and, as a result, their debt-collection tactics will not be "restrained by the desire to protect their good will when collecting past due accounts." *Id.* at 30-31 (quoting *Fair Debt Collection Practices Act*, S. Rep. No. 382, 95th Cong., 1st Sess. 2 (1977)). In light of the statutory context and the legislative history, the phrase "for another" in the "assignment" exception is best understood to mean "that the debts should have *originally* belonged to another and that the creditor was therefore in effect a third-party or independent creditor" who would be subject to the consumer-protection provisions of the FDCPA. *Kimber*, 668 F. Supp. at 1485.

Hutchins demonstrates no error in the court of appeals' statutory analysis, nor is there a conflict between the court's decision and a decision of this Court or any other court of appeals. Indeed, the other courts of appeals to have addressed the issue agree that the statutory distinction between a "creditor" and a "debt collector" depends, in the case of a third party to whom a debt has been transferred or assigned, solely upon whether the debt in question was in default at the time of the transfer or assignment. Pet. App. 30 (citing, *inter alia*, *Schlosser* v. *Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003); *Wadlington* v. *Credit Acceptance Corp.*, 76 F.3d 103, 106-107 (6th Cir. 1996); *Perry* v. *Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985)). Because

petitioners acquired the NSF checks when those debts were in default, the court correctly held that petitioners were "debt collectors" for purposes of the FDCPA.

2. Hutchins contends (Pet. 10-16) that the persons who wrote the NSF checks are criminals and tortfeasors and, therefore, are not "consumers" protected by the FDCPA. The court of appeals correctly rejected that argument.

The FDCPA contains an "all inclusive" definition of the term "consumer" that encompasses "*any* natural person obligated or allegedly obligated to pay *any* debt." Pet. App. 25 (quoting 15 U.S.C. 1692a(3)). See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning[.]"). The FDCPA also defines the term "debt" broadly to mean "any obligation * * * of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. 1692a(5). The NSF checks at issue here were tendered to merchants by customers engaged in retail transactions and thus were "debts" as that term is defined by the FDCPA. Moreover, the writers of the NSF checks, who became obligated to pay those obligations after the NSF checks were dishonored, were "consumers" as the FDCPA defines that term.

Hutchins contends (Pet. 10-11) that the inclusive term "any" in the definition of "consumer" is not "instructive of the meaning and intent" of the FDCPA because a literal interpretation of that term would "require inclusion of" criminals and tortfeasors within the definition of "consumers" subject to FDCPA protection. For that reason, Hutchins asserts (Pet. 11) that the court of

appeals' decision "effectively constitute[s] a reversal" of the court's prior holdings in *Zimmerman* v. *HBO Affiliate Group*, 834 F.2d 1163 (3d Cir. 1987), and *Pollice* v. *National Tax Funding, L.P.*, 225 F.3d 379 (3d Cir. 2000). Hutchins's arguments are without merit.

The court of appeals correctly determined that the FDCPA's definition of "consumer" contains no "fraud exception" and applies to "any" debt arising out of a qualifying transaction. Pet. App. 21 (citing *Bass* v. *Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1329 (7th Cir. 1997)). A fraud exception also would be inconsistent with Congress's purpose in enacting the FDCPA. In particular, Congress considered the fact that some persons "willfully refuse to pay just debts," *id.* at 23 (quoting *Keele* v. *Wexler*, 149 F.3d 589, 596 (7th Cir. 1998) (internal quotation marks omitted)), but Congress nevertheless included no exception to the term "consumer" for such individuals. Congress "apparently believe[d] that the serious and widespread abuses of debt collectors outweighed the necessity to carve out an exception." *Ibid.* (quoting *Keele*, 149 F.3d at 596 (internal quotation marks omitted)). By its omission, "Congress has clearly indicated its belief that no consumer deserves to be abused in the collection process." *Id.* at 22 (quoting *Bass*, 111 F.3d at 1330).

There also is no conflict between the court of appeals' decision and the decisions in *Zimmerman* and *Pollice*. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (it is primarily the task of a court of appeals to reconcile internal conflicts between its decisions). The FDCPA provides that a "debt" must arise out of a "transaction" that is engaged in primarily for personal, family, or household purposes. 15 U.S.C. 1692a(5). In *Zimmerman*, the court held that no qualifying transac-

tion had occurred when individuals allegedly intercepted cable television signals by installing unauthorized antennae. 834 F.2d at 1167-1169. In *Pollice*, the court held that water and sewer obligations owed by homeowners to the government for services they receive are "debts" under the FDCPA, but that a homeowner's property tax obligation—which involves no underlying transaction for goods or services—does not constitute such a "debt." 225 F.3d at 400-402. Like the water and sewer obligations addressed in *Pollice*, the NSF checks arose out of consumer transactions for goods and/or services and are distinguishable from intercepted television signals, tax obligations, unpaid child support, criminal restitution, and the other non-debt obligations on which Hutchins relies (Pet. 12-13 & n.7). The fact that some payors of NSF checks might be subject to criminal or tort liability does not alter the fact that a "debt" under the FDCPA exists if the payor's obligation arose out of a qualifying transaction for goods or services.

3. Hutchins contends (Pet. 16-19) that the FTC failed to establish FTC Act violations because it did not satisfy 15 U.S.C. 45(n). The court of appeals did not address that claim, which petitioners first raised in their reply brief in that court. See *In re Surrick*, 338 F.3d 224, 237 (3d Cir. 2003) (failure to identify or argue issue in opening brief constitutes waiver of argument on appeal), cert. denied, 540 U.S. 1219 (2004). Accordingly, the claim is not properly before this Court.

Hutchins's claim also lacks merit because 15 U.S.C. 45(n) is not implicated in this case. Section 5(n) of the FTC Act sets forth the standard of proof the FTC must satisfy in order to declare a practice "unfair" under 15 U.S.C. 45(a). The FTC did not allege that any of petitioners' acts or practices was "unfair" under the

FTC Act, but instead asserted that petitioners' conduct violated Section 5(a) because it was *deceptive*. The standard of proof at 15 U.S.C. 45(n) does not apply when the FTC challenges conduct as "deceptive" under the FTC Act. Hutchins's claim is thus without merit.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General

WILLIAM BLUMENTHAL
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LAWRENCE DEMILLE-WAGMAN
Assistant General Counsel for Litigation
Federal Trade Commission

OCTOBER 2008

---

[4] Hutchins asserts in the alternative (Pet. 16) that the FTC failed to present evidence of injury to "commerce." Section 5(n) contains no such requirement; the FTC Act requires only that a defendant's practices be "in or affecting commerce." 15 U.S.C. 45(a)(1). Hutchins does not dispute that petitioners' unlawful practices were "in or affecting commerce" under the FTC Act, and the interstate communications by mail and telephone engaged in by petitioners clearly satisfied that standard.